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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY

EDWARD D. WRZESIEN and LACEY VAN GRINSVEN, individually and on behalf of all similarly situated persons, and MEGAN ASHTON, individually, Plaintiffs, vs. STATE OF MONTANA and MONTANA PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION, Defendants.	Cause No. DDV 2012-931 Hon. James P. Reynolds **PLAINTIFFS' REPLY SUPPORTING CROSS-MOTION FOR SUMMARY JUDGMENT**

I. Introduction

In responding to Plaintiffs' cross-motion for summary judgment, the State chooses to ignore several arguments that are inconvenient to its position. Instead, the State implies Plaintiffs are greedy for daring to challenge a system that effectively grants them a lesser employer-paid retirement contribution than their

peers who participate in the DB Plan.[1] The State, in turn, urges the Court to simply rubber stamp the Legislature's creation of the Plan Choice Rate and the additional 1% employer contribution.[2] To the contrary, Plaintiffs have established that the Plan Choice Rate is discriminatory without any rational basis and is arbitrary and unreasonable in its effects; therefore, the Plan Choice Rate violates Plaintiffs' respective rights to equal protection of the laws and due process and the Court should deny the State's motion for summary judgment and instead grant summary judgment in Plaintiffs' favor.

II. Argument

Plaintiffs have adequately addressed the relevant facts and law in their opening brief. They take this opportunity to address a few key points raised by the State in its response/reply brief.

A. The classes are similarly situated for equal protection purposes and the Plan Choice Rate is arbitrary and not rationally related to maintaining an actuarially sound DB Plan.

In arguing that the two classes are not similarly situated, the State focuses on the benefits of each retirement plan rather than the mechanics of the employer-paid retirement contribution. Type and payment of benefits is not the issue. The issue before the Court is the receipt and allocation of the employer-paid retirement

[1] Plaintiffs will use the same abbreviations and shorthand references in this brief that were used in their opening brief.

[2] These will be referred to collectively as the Plan Choice Rate unless context requires otherwise.

contributions, for which there can be no question the classes are similarly situated. The State's effort to differentiate between the benefits allowed under each retirement plan is simply a distraction. All PERS-eligible public employees are eligible to participate in a retirement plan and all currently receive an employer-paid retirement contribution that is purportedly 8.17% of compensation. Only DC Plan and ORP[3] participants have a portion of their employer-paid retirement contribution paid into a plan in which they do not participate and from which they are statutorily-precluded from benefiting. DB Plan participants, contrarily, have their entire employer-paid retirement contribution paid into the plan in which they participate and from which they receive benefits. The classes are, therefore, similarly situated.

The State further contends that the employer-paid retirement contribution is not a benefit conferred upon each employee, but is instead a percentage-of-payroll that can be divided however the Legislature sees fit. This argument is belied by the law, the facts, and the materials the State produced to support its motion for summary judgment. Indeed, if the 8.17% employer-paid retirement contribution is not a benefit conferred to each employee, there is no reason for the Plan Choice Rate to exist. Instead, the Legislature would have directed that DC Plan

[3] The DC Plan and the ORP will be referred to collectively as "the DC Plan" and DC Plan and ORP participants will be referred to collectively as "DC Plan participants" unless context requires otherwise.

participants receive a 4.17% employer-paid retirement contribution and required the State and other participating employers to pay additional monies into the DB Plan. There would be no reason to create the appearance of "costs" incurred by DC Plan participants and a "fee" to repay those costs. The State's argument renders the Plan Choice Rate a nullity.

In addition to this legal reality, the State's own materials establish that the State represents that DB Plan and DC Plan participants are granted the same employer-paid retirement contribution. *See e.g. Defs.' Br., Ex. 4A* at 9(noting that both the employer and the employee make contributions to fund future retirement income from the DB Plan and that the "Employer Contributions" are 6.9% of compensation); *id.* at 16 (noting that with the DC Plan, "both the employer and the employee make contributions to fund a future retirement account balance for the participant and that the gross employer contribution is 6.9% of compensation); *id.* at 99 (referencing the "Allocation of 6.9% Employer Contribution"). Like the Plan Choice Rate itself, there would be no reason for the State to discuss "gross" and "net" employer-paid retirement contributions if the full employer-paid retirement contribution was not a benefit conferred upon each employee.

Finally, the State simply ignores the fact that the State credits Ms. Ashton and Ms. Van Grinsven with a full 8.17% employer-paid retirement contribution

each time they are paid. If the full employer-paid retirement contribution was not a benefit conferred upon each employee, there would be no reason for this.

To be sure, the State is partially correct when it contends that "[t]he Legislature could have . . . set the employer contribution for those in defined contribution plans at 4.17% and then provided a lump sum yearly payment from the State and local funds to address the UAL." *Defs.' Br.* at 6. It is true that the Legislature could have created such a system so long as all employees received a 4.17% employer-paid retirement contribution, regardless of whether they participate in the DB Plan or the DC Plan. The Legislature chose not to do so and instead created a system in which all PERS-eligible employees purportedly receive an identical employer-paid retirement contribution, only to effectively reduce the contribution for those who participate in the DC Plan. Since it chose to create the system it did, however, the Legislature cannot effectively reduce DC Plan participants' employer-paid retirement contribution by forcing them to pay into a plan from which they are precluded from participating. Yet that is precisely what the Plan Choice Rate does. This is arbitrary and not rationally related to keeping the DB Plan actuarially sound and should not be allowed to continue.

B. *Farrier* does not preclude the relief Plaintiffs are seeking.

In arguing that the Plan Choice Rate is rationally related to the State's interest in keeping the DB Plan actuarially sound, the State relies heavily on

Farrier v. Teacher's Retirement Board. The State construes *Farrier* in a simplistic and overly broad manner.

In *Farrier*, the plaintiff challenged a law that precluded him from receiving benefits from the Teachers Retirements System while he was also employed by the University of Montana and was contributing to the University System's Optional Retirement Program. 2005 MT 229, ¶¶7-9, 328 Mont. 375, 120 P.3d 390. The issue before the Court was whether it was rational for the Legislature to preclude a person from drawing benefits from one public pension, while at the same time drawing a public salary and accruing a second public pension. *See id.*, ¶20. The court determined that it was rational to do so. *Id.*, ¶21.

This case does not involve the payment or receipt of benefits, nor does it involve eligibility to participate in a second public pension plan. The issue, instead, is whether all PERS-eligible employees are entitled to receive the same employer-paid retirement contribution regardless of which retirement plan they choose. Also at issue is whether DC Plan participants should be required to fund, through their employer-paid retirement contribution, a retirement plan from which they are precluded from receiving benefits. *Farrier* and the generalized language the State relies upon do not determine these issues.

The State further criticizes Plaintiffs for offering what it deems "speculative calculations" without expert actuarial analysis to "infer [*sic*] that the Plan Choice

Rate is not necessary." *Defs.' Br.* at 10. Plaintiffs did not offer speculative calculations, nor did they offer actuarial valuations. Instead, Plaintiffs established through statutory language that the Plan Choice Rate is based on a false premise – that DC Plan participants "cost" the DB Plan. As Plaintiffs pointed out, the alleged cost is calculated by taking the difference between what the unfunded actuarial liability is and what it would be if all DC Plan participants instead contributed to the DB Plan. This calculation does not take into account that DC Plan participants do not receive benefits from the DB Plan. In other words, the savings are never factored in. The State does not dispute this, but instead simply dismisses Plaintiffs' argument as speculation.

Furthermore, in its opening brief the State engaged in hyperbole regarding what it alleges would happen to the DB Plan if Plaintiffs prevail, an approach the State continues in its response/reply brief. Noticeably absent from the State's argument, however, were any numbers or facts to give the Court context. Plaintiffs used simple math and readily available - and indisputable - numbers to supply the context the State chose to avoid. The old line that lawyers choose law school because they are not good at math notwithstanding, the simple math set forth in Plaintiffs' brief is subject to judicial notice, as the calculations and results are based on indisputable figures and are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." *See* Mont.

R. Evid. 201(b)(2). Plaintiffs do not need an expert to establish these calculations any more than they would need an expert to establish that two plus two equals four.

The State's hyperbole continues through its argument that DB Plan participants would be prejudiced if the Court finds the Plan Choice Rate unconstitutional. The State goes so far as to argue, without factual support, that the end of the Plan Choice Rate "may contribute to a [bankruptcy] scenario" for the DB Plan. For undisclosed and unknown reasons, the State even asks the Court to "take judicial notice of Detroit's bankruptcy."

The funds deposited in the DB Plan through the Plan Choice Rate are relatively insignificant. From its inception on July 1, 2002, through March 22, 2013, $21.68 million had been collected through the Plan Choice Rate and deposited in the DB Plan. *Defs.' Resps. Interrog. No. 3* (March 22, 2013), attached as **Exhibit 4** to Plaintiffs' opening brief. During a similar period, July 1, 2003, through June 30, 2013, the State and participating employers contributed nearly $749 million to the DB Plan. *Public Employees Retirement Board Comprehensive Annual Financial Report, FY 2013* at 192-93 (hereinafter "*Annual Report*"), additional excerpts attached as **Exhibit 7**. Total contributions to the DB Plan during that time, which include employee contributions, were $1.48 ***billion***. *Id.*

The State's contention that DB Plan participants will be harmed in any way by a declaration that the Plan Choice Rate is unconstitutional is not supported by the law or facts. As Plaintiffs pointed out in their opening brief, and as the State acknowledges, retirement benefits for DB Plan participants are controlled by statute, not by the balance or actuarial position of the DB Plan. Indeed, it is ironic that the State relies heavily on Montana's constitutional requirement that all retirement systems be funded in an actuarially sound manner to justify the Plan Choice Rate, but throws the mandate out the window to argue that DB Plan participants are necessary parties to this case. Suddenly, ending the Plan Choice Rate and the relatively insignificant amount it adds to the DB Plan would have catastrophic consequences. If the 25% market loss in 2008 and 2009 did not "bankrupt" the DB Plan, however, it is hard to understand how a reduction in contributions of less than 1.5% would lead to such an outcome. *See Public Employees' Retirement System of the State of Montana, Actuarial Valuation as of June 30, 2013* at 12, excerpts attached as **Exhibit 6**. This is especially true since the contributions can easily be made up through a funding mechanism that is constitutional and does not discriminate against DC Plan participants. *See e.g.* Mont. H.B. 454, 63d Leg. (*eff.* July 1, 2013)(appropriating up to $36 million in funds annually for PERS through unallocated portions of coal tax severance collections and interest income from the coal tax permanent fund); Mont. H.B. 1,

59th Leg. Spec. Session (*eff.* July 1, 2006)(appropriating $25 million from the general fund to the public employee's retirement system pension trust fund); *see also* Mont. Code Ann. §19-3-204 (granting contracting employers the ability to assess a tax above the annual rate of taxation allowed by law to meet employer contribution obligation).

In its effort to defend the Plan Choice Rate, the State has attempted to make this case about everything other than the issue at hand: is reducing DC Plan participants' employer-paid retirement contribution to help fund a retirement plan in which they do not participate and from which they are statutorily precluded from receiving benefits rationally related to the State's interest in keeping the DB Plan actuarially sound? The State never squarely addresses this issue, but argues in a vacuum that the Plan Choice Rate and the additional 1% contribution help keep the DB Plan actuarially sound. The State does not address how requiring a non-participant to contribute nearly 40% of her employer-paid retirement contribution is rationally related to the objective. And most certainly, it is not.

C. The Court should disregard the speculative and unsupported affidavit testimony of the State's actuary.

With its opening brief, the State submitted an unsworn letter from actuary Stephen McElhaney. After Plaintiffs pointed out that the letter was unsworn and inadmissible, the State submitted with its response/reply brief a declaration signed by Mr. McElhaney in which he incorporates by reference the general assertions set

forth in his letter. Specifically, Mr. McElhaney states that the "*general effects upon the PERS Defined Benefit Plan* that I list in the letter, if all of the Plan Choice Rate Contributions were returned and future contributions were prohibited, are correct *to the best of my knowledge.*" *Decl. Stephen T. McElhaney*, ¶3 (June 20, 2014)(emphasis added). Mr. McElhaney's letter, in turn, sets forth five "general effects" that he claims would befall the DB Plan if the Court rules in Plaintiffs' favor.

Expert testimony is permitted when "scientific, technical, or other specialized knowledge will assist the trier of fact ***to understand the evidence or to determine a fact in issue.***" Mont. R. Evid. 702 (emphasis added). The issue for the Court to decide at this juncture is not factual, but legal: is the Plan Choice Rate constitutional? An unconstitutional system cannot be saved simply because striking it down may have some impact on the DB Plan.

Mr. McElhaney offers only general statements without any specific facts to support the assertions. For example, he asserts that the DB Plan's assets would be lowered by the amount of any refund of payments made through the Plan Choice Rate. Yet the issue currently before the Court is not whether Plaintiffs are entitled to a refund of Plan Choice Rate deductions, but whether the Plan Choice Rate itself is constitutional. Refund issues will be addressed at a later time. Nevertheless, if

the Court finds the Plan Choice Rate unconstitutional, it also establishes that Plan Choice Rate deductions never should have been taken in the first place.

Mr. McElhaney likewise asserts that a reduction in the funded ratio of the DB Plan "could result in lower GABA being granted to retired members." Mr. McElhaney is referring to provisions adopted by the 2013 Legislature in H.B. 454 that allow the GABA to be reduced from 3%. The State relies on this statement to support its assertion that DB Plan participants are necessary parties. As the Court is aware, of course, and the State certainly should be aware, the State has been enjoined from enforcing the GABA reduction provisions of House Bill 454. *Ord. Granting Prelim. Injunction*, Mont. 1st Jud. Dist., Cause No. DDV-2013-788 at 11 (Dec. 20, 2013).

Simply put, the fact that a ruling in Plaintiffs' favor may have some minor negative impact on the DB Plan is irrelevant, as any such impact cannot make an unconstitutional system constitutional. Regardless, any deficit created by the elimination of the Plan Choice Rate can easily be made up through an increase in the employer contribution, an increase in the employee contribution, injections from the general fund, or any other number of ways. But what might be done to replace Plan Choice Rate revenue is not for the Court to decide; the Court need only determine whether the Plan Choice Rate is constitutional. If the Court

decides it is not, it will be up to the Legislature to decide how to fix the unfair, arbitrary, and unconstitutional system it created.

III. Conclusion

The issue for the Court to decide is whether the Plan Choice Rate and the additional 1% contribution violate Plaintiffs' respective rights to equal protection and due process. Plaintiffs have established that they are unreasonable and arbitrary and not rationally related to keeping the DB Plan actuarially sound. Accordingly, the Court should enter an order granting summary judgment in Plaintiffs' favor and denying the State's motion.

DATED this 1st day of August, 2014.

KALKSTEIN, JOHNSON & DYE, P.C.

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2014, a true and correct copy of the foregoing was served upon the following by the means indicated:

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EXHIBIT 6

Public Employees' Retirement System of the State of Montana

Actuarial Valuation as of June 30, 2013

Produced by Cheiron

October 2013

CHEIRON Classic Values, Innovative Advice

SECTION II
ASSETS

Investment Performance

The market value of assets (MVA) returned 12.99% during the fiscal year ended 2013, which is more than the assumed 7.75% return. A return of 11.91% on the actuarial value of assets (AVA) is primarily the result of the asset smoothing method being utilized for the calculation of the actuarial value of assets. Since only 25% of the gain or loss from the performance of the System is recognized in a given year, in periods of very good performance, the AVA can lag significantly behind the MVA. In a period of negative returns, the AVA does not decline as rapidly as the MVA.

Table II-5
Annual Rates of Return

Year Ending June 30,	Market Value	Actuarial Value
2005	8.03%	5.32%
2006	8.98%	9.25%
2007	17.92%	11.94%
2008	(4.91%)	7.62%
2009	(20.85%)	(0.16%)
2010	12.91%	(1.18%)
2011	21.70%	(0.08%)
2012	2.27%	3.28%
2013	12.99%	11.91%

EXHIBIT 7

Public Employees' Retirement Board

A Component Unit of the State of Montana

Changes in Fiduciary Net Position, Last Ten Fiscal Years

(In thousands)

Fiscal Year	2004	2005	2006	2007	2008	2009
PERS-DBRP						
Additions						
Member Contributions[1]	$ 62,664	$ 66,986	$ 66,145	$ 69,150	$ 72,874	$ 76,003
Employer Contributions[2]	58,231	60,454	88,573	67,195	72,270	75,949
State Contributions	403	421	443	446	378	357
Investment Income[3]	360,266	244,976	293,679	629,559	(197,030)	(796,242)
Other						
Total Additions to Net Position	481,564	372,837	448,840	766,350	(51,508)	(643,933)
Deductions						
Benefits	132,683	142,789	153,886	166,188	180,815	196,402
Refunds	10,913	13,236	12,754	12,868	12,123	10,821
Administrative Expenses	2,825	2,569	2,886	2,681	2,832	2,948
Other[4]	1,882	1,516	1,816	2,108	1,987	1,713
Total Deductions to Net Position	148,303	160,110	171,342	183,845	197,757	211,884
Change in Net Position	$ 333,261	$ 212,727	$ 277,498	$ 582,505	$(249,265)	$ (855,817)
JRS						
Additions						
Member Contributions[1]	$ 443	$ 412	$333	$ 339	$ 385	$ 584
Employer Contributions	1,136	1,162	1,229	1,249	1,315	1,347
Investment Income[3]	5,248	3,640	4,344	9,435	(2,991)	(12,103)
Total Additions to Net Position	6,827	5,214	5,906	11,023	(1,291)	(10,172)
Deductions						
Benefits	1,670	1,624	1,743	1,772	1,829	1,972
Refunds						
Administrative Expenses	14	9	12	8	9	17
Other[4]						
Total Deductions to Net Position	1,684	1,633	1,755	1,780	1,838	1,989
Change in Net Position	$ 5,143	$ 3,581	$ 4,151	$ 9,243	$ (3,129)	$ (12,161)
HPORS						
Additions						
Member Contributions[1]	$ 743	$ 862	$ 851	$ 1,005	$ 1,082	$ 1,035
Employer Contributions	2,859	3,324	2,905	3,634	3,949	4,151
State Contributions	348	669	277	285	290	285
Investment Income[3]	9,322	6,353	7,453	15,875	(4,929)	(19,978)
Total Additions to Net Position	13,272	11,208	11,486	20,799	392	(14,507)
Deductions						
Benefits	5,493	5,790	6,365	6,460	6,814	7,127
Refunds	144	181	89	139	61	26
Administrative Expenses	31	29	31	28	27	49
Other[4]	152	49	1	139	14	17
Total Deductions to Net Position	5,820	6,049	6,486	6,766	6,916	7,219
Change in Net Position	$ 7,452	$ 5,159	$ 5,000	$ 14,033	$ (6,524)	$ (21,726)

Contributions were made in accordance with statutory requirements.

[1] Includes Interest Reserve Buybacks.

[2] Includes Membership Fees, Retirement Incentive, Miscellaneous Revenue and Education Contributions.

[3] Includes Common Stock Dividends.

[4] Includes Transfers to the DC, MUSRP, Prior Year Adjustments and Refunds to Other Plans.

2010	2011	2012	
$ 78,671	$ 77,875	$ 79,332	
80,326	79,173	80,049	
537	546	536	
387,861	715,398	91,355	
547,395	872,992	251,272	
212,186	231,223	252,762	
10,967	11,539	11,991	
3,257	3,327	3,386	
3,438	794	1,028	
229,848	246,883	269,167	
$ 317,547	$ 626,109	$ (17,895)	
$ 595	$ 504	$ 447	
1,468	1,477	1,598	
6,013	11,392	1,517	
8,076	13,373	3,562	
2,118	2,240	2,344	
10	39	118	
24			
2,152	2,279	2,462	
$ 5,924	$ 11,094	$ 1,100	
$ 1,262	$ 1,270	$ 1,299	
4,763	4,543	4,966	
287	278	269	
9,714	17,912	2,321	
16,026	24,003	8,855	
7,557	7,866	8,223	
56	121	65	
35	56	122	
37		3	
7,685	8,043	8,413	
$ 8,341	$ 15,960	$ 442